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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 119

LOCAL 19, INTERNATIONAL BROTHERHOOD OF LONGSHOREMEN, AFL-CIO,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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vs.

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Local 19, International Brotherhood of Longshoremen, AFL-CIO, petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Seventh Circuit entered in this case on February 28, 1961.

Opinions Below.

The opinion of the court below (App., *infra*, pp. 47-54), is reported at 286 F. 2d 661. The Decision and Order of the Board (App., *infra*, pp. 28-46) is reported at 125 NLRB 61. The Trial Examiner's intermediate report (Appendix, *infra*, pp. 17-27) is not reported elsewhere.

Jurisdiction.

The opinion of the Court of Appeals was filed on January 10, 1961. (App. *infra*, pp. 47-54.) The final decree was entered on February 28, 1961, and on the same date the Court of Appeals denied the petition for rehearing. (App. *infra*, pp. 55-60.) The jurisdiction of this Court is invoked under 28 U. S. C. 1254, and Section 10(e) of the National Labor Relations Act, as amended.

QUESTION PRESENTED.

Where the trial examiner dismissed a complaint on the basis of his stated findings and conclusions, upon a particular issue, and where the Board reversed the examiner without stating contrary findings and reasons as to that issue and without making findings or otherwise ruling upon another material defense which the petitioner had presented by appropriate exception, was it error for the Court of Appeals to enforce the Board's order.

STATUTES INVOLVED.

The statutory provisions involved are the National Labor Relations Act, as amended, 61 Stat. 136, 29 U. S. C., § 151 *et seq.*, Section 10(e); and the Administrative Procedure Act, 60 Stat. 237, 5 U. S. C., § 1001 *et seq.*, Sections 1007(b) and 1009(e). Also involved are the National Labor Relations Board Rules and Regulations and Statements of Procedure, Series 8, 1959, § 101.12. Relevant provisions of the foregoing are printed in Appendix A, *infra*, pp. 13-16.

STATEMENT.

A. The Intermediate Report and the Board's Order.

The Board's complaint charged that the petitioner had refused to bargain upon request with an employer association concerning a collective bargaining agreement for a single employer. The petitioner raised these defenses (among others which are not involved in this petition): (1) petitioner denied that the association had ever made a request for bargaining as alleged in the complaint; (2) petitioner affirmatively alleged that the employer had itself engaged in improper conduct which prevented bargaining by the petitioner. After a full hearing, the Board's trial examiner recommended dismissal of the complaint. He found that there was no evidence that the association had made a request for bargaining as was alleged in the complaint, and that therefore there could be no finding that the petitioner had refused to bargain with the association.[1] The trial examiner found it unnecessary to rule upon the other issues. Exceptions were filed by all parties,

1. "Thus I find there is no evidence in the record to support the allegations in the amended complaint and the statements in the bill of particulars that the Association requested the Respondent to bargain with it and that the Respondent failed and refused to bargain. Without a request to bargain on the part of the Association on and after May 17, 1957, there can be no refusal to bargain with the Association on the part of the Respondent. Whatever requests were made of the Respondent to bargain with respect to a contract with Chicago Stevedoring Co., Inc., were made by Chicago Stevedoring Co., Inc., or by Turner, as attorney for Chicago Stevedoring Co., Inc. The record fails to disclose any requests to bargain by Turner as a representative of an association.

"Accordingly, I find that in the absence of any requests by an association, the Respondent did not refuse to bargain with the Association on and after May 17, 1957. Nor did it refuse to bargain prior to May 17. On May 16 and 17, 1957, as shown above, the Respondent was discussing in negotiation sessions, the situation involving Chicago Stevedoring Co., Inc., and it was the employer group that insisted that the problems of Chicago Stevedoring Co., Inc., and the Respondent be deferred until later." Intermediate Report, Appendix B, *infra*, p. 26.

the petitioner preserving an exception to the trial examiner's failure to rule on the defense that misconduct by the employer had prevented bargaining.[2]

In its decision and order the Board reversed the trial examiner and concluded that the petitioner had violated Section 8(b)(3) of the Act by refusing to bargain with the association. However, it made no finding whatsoever that *the association* had ever made a request for bargaining. Similarly, the Board made no findings of any kind with respect to the petitioner's defense that the individual employer's misconduct had prevented bargaining.

B. The Decision of the Court of Appeals.

The Court of Appeals granted enforcement of the Board's order. The court recognized in its opinion that the Board had not expressly stated a finding concerning a request for bargaining. The court however said that such a finding was "implicit."[3] The court did not discuss the Board's failure to make any findings with respect to the issue of misconduct by the employer. In its petition for rehearing, the petitioner raised before the court below the single issue of the Board's failure to make and state findings on these two material issues. Although the Board filed no answer to the petition for rehearing, the court below denied the petition without comment. At no time in these proceedings has the Board claimed to have made findings on the two issues. The Board has simply ignored the question.

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2. The particular exception is printed in the *Appendix to Brief for Respondent*, in the Court below, at p. 109, par. 3.
The petitioner's answer setting forth the affirmative defense is printed in the *Appendix* to the Board's brief, in the Court below, at p. 134, par. VIII.

3. "A finding that respondent was being requested to bargain with the association is implicit in the findings and conclusions of the Board, although it is not individually stated in so many words." Opinion, Appendix, *infra*, p. 52.

REASONS FOR GRANTING THE WRIT.

The issue presented here—the necessity for explicit administrative findings and reasons, especially where the agency has rejected the examiner's findings—may at first appear narrow, but in the petitioner's view it warrants review by this Court because every administrative decision of all agencies subject to the Administrative Procedure Act is affected, and because the administration of the National Labor Relations Act is closely involved.

The decision below conflicts with the decisions of courts of appeals in other circuits with respect to the requirement of specific findings in administrative determinations under the Administrative Procedure Act.[4] Other circuit courts have enforced the requirement that findings, conclusions and reasons for decision be expressly stated.[5] In the instant case the court below approved without comment the Board's failure to state a finding on a material issue which was preserved by exceptions after being litigated before the examiner. On another issue, upon which the Board rejected the examiner's findings without making any finding of its own, the court excused the Board's omission by saying that a finding was "implicit." The decision below clearly conflicts with the ruling of the Court of Appeals for the District of Columbia in *KFH Co.* v. *F. C. C.*, 247 F. 2d 570, 572 (1957), where that court said: "Though a specific ruling on each minor exception is not indispensable,

4. 5 U. S. C. § 1001 et seq., Sec. 1007 (b).

5. *In re United Corporation*, 249 F. 2d 168, 179-181 (C. A. 3, 1957); *Carroll Broadcasting Co.* v. *F. C. C.*, 258 F. 2d 440, 443-444 (C. A. D. C., 1958); *Spiegel* v. *Public Utilities Commission of District of Columbia*, 226 F. 2d 29, 33 (C. A. D. C. 1955), certiorari denied, 350 U. S. 904 (1955); *State Corporation Commission of Kansas* v. *F. P. C.*, 206 F. 2d 690, 725 (C. A. 8, 1953), certiorari denied 346 U. S. 922; *So. Carolina Generating Co.* v. *F. P. C.*, 249 F. 2d 755, 764 (C. A. 4, 1957), certiorari denied 356 U. S. 912; *Radio Station KFH Co.* v. *F. C. C.*, 247 F. 2d 570, 572 (C. A. D. C., 1957).

the parties and the court should not be left to guess, with respect to any material issue, or to any group of matters that may have cumulative significance, which of several alternatives the Commission had in mind. It should make the basis of its action reasonably clear.'"[6] In harmony with the latter case and in similar conflict with the court below is the Court of Appeals for the Third Circuit which said: "As to every material issue presented, an administrative agency must make findings of fact. Further, where the agency fails to adopt the findings of the hearing examiner, the Act requires the agency to make a finding or ruling on each exception taken to the intermediate report.'"[7]

The statutory requirements for a statement of findings by the Board are mandatory. Section 10(c) of the National Labor Relations Act[8] directs that the Board "state its findings of fact" in any unfair labor practice decision. The Administrative Procedure Act more specifically spells out the agency's duty to include in all decisions "findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law or discretion presented on the record. * * *"[9] Where the agency fails, as here, to adopt the findings of the trial examiner, the Act requires the Board to make a finding or ruling on each exception taken to the intermediate report.[10] Indeed, even the Board's own published statement of procedure[11] advises litigants that in all cases its "decision and order contains detailed findings of fact, conclusions of law, and basic reasons for decision on all material issues raised. * * *"

6. 247 F. 2d 570, at 572.

7. *In re United Corporation*, 249 F. 2d 168, 181 (C. A. 3, 1957).

8. 29 U. S. C. § 151 et seq., Sec. 10(c).

9. 5 U. S. C. § 1001 et seq., sec. 1007 (b).

10. *In re United Corporation*, 249 F. 2d 168, 181.

11. National Labor Relations Board, Rules and Regulations and Statements of Procedure, Series 8; as amended, 24 F. R. 9095, § 101.12.

It is clear that the Board violated the express directions contained in the National Labor Relations Act and the Administrative Procedure Act, as well as its statements of procedure, in omitting entirely findings, conclusions and reasons for decision on material issues raised by exception and by the Board's rejection of the examiner's basic findings and conclusions.

It is important for the consideration of this Court to observe that there is also involved in the decision below a conflict in principle with this Court's decisions antedating the Administrative Procedure Act, that administrative agencies must state their findings on material issues.[12] This Court's decision in *S. E. C.* v. *Chenery Corp.*[13] plainly posted this standard for administrative agencies: "The Commission's action cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order as an appropriate safeguard under the Act. There must be such a responsible finding." Similarly, early in the Board's own history, this Court planted this rule for administrative decision: "The administrative process will best be vindicated by clarity in its exercise • • • it will avoid needless litigation and make for effective and expeditious enforcement of the Board's order to require the Board to disclose the basis of its order."[14] The conflict in principle between the decision below and the *Chenery* rule is additional reason for the granting of a writ of certiorari.

The decision below is also a serious departure from the orderly scheme of judicial review in another basic area.

12. *S. E. C.* v. *Chenery Corp.*, 318 U. S. 80, 94-95 (1942); *Beaumont, S. L. & W. Ry.* v. *U. S.*, 282 U. S. 74, 86 (1930).

13. *S. E. C.* v. *Chenery Corp.*, 318 U. S. 80, 94.

14. *Phelps Dodge Corp.* v. *N. L. R. B.*, 313 U. S. 177, 197 (1941). See also, *N. L. R. B.* v. *Fansteel Metallurgical Corporation*, 306 U. S. 240, 261 (1939).

In *Universal Camera Corp.* v. *N. L. R. B.*,[15] this Court instructed the courts of appeal that they must "accord the findings of the trial examiner the relevance that they reasonably command in answering the comprehensive question whether the evidence supporting the Board's order is substantial." In that decision this Court emphasized the significance of the trial examiner's role in administrative determinations. The decision of the Court of Appeals, however, plainly fails to accord *any* weight or relevance to the examiner's findings. Even though the examiner had expressly found that there was no evidence of a request for bargaining by the employer association, the Board, while reversing the trial examiner, made no contrary finding on this issue of crucial materiality. The Court of Appeals stated that there was an "implicit" finding. But even if it were assumed, *arguendo*, that an "implicit" finding can be made, it is manifest that considerably more than an "implicit" finding by the Board should have been required by the court to overcome the weight of the examiner's *explicit* findings in determining whether the Board's order was supported by substantial evidence. In view of the examiner's flat finding that there was "*no evidence in the record to support the allegations in the amended complaint* * * * that the Association requested the Respondent to bargain with it * * *," the court below was required under *Universal Camera* to accord relevance to that finding. Since the Board's rejection of the examiner's finding is unaccompanied by contrary findings or by any statement of reasons, and makes no reference to any supporting evidence, the court below under *Universal Camera* had no real alternative but to conclude that the Board's order was not sustained by substantial evidence. We submit that neither the Board nor the court below could have found in the record any evidence

15. 340 U. S. 474, 492-497 (1950).

to support a finding contrary to the trial examiner's.[16] The Board's absent finding reflects the accuracy of the examiner's statement that there was *no evidence* to support the allegation in the complaint. The *Universal Camera* rule is so fundamental in the structure of administrative review that the error in the decision below warrants the issuance of certiorari.

It is manifest that the two issues upon which the Board made no findings are "material" issues within the meaning of the Administrative Procedure Act. The first was whether a request for bargaining had been made by the employer association. Since *N. L. R. B.* v. *Columbian Enameling & Stamping Co.*, 306 U. S. 292, it has been well established that a request for bargaining is an essential prerequisite to the duty to bargain.[17] The trial examiner

16. As Judge Frank said in *U. S.* v. *Forness*, 125 F. 2d 928, 942 (C. A. 2, 1942), certiorari denied, 316 U. S. 694: "Often a strong impression that on the basis of the evidence the facts are thus-and-so, gives way when it comes to expressing that impression on paper."

17. See *N. L. R. B.* v. *Valley Broadcasting Company*, 189 F. 2d 582 (C. A. 6, 1951); *Atlas Life Insurance Co.* v. *N. L. R. B.*, 195 F. 2d 136 (C. A. 10, 1952); *Parker Bros.*, 101 NLRB 872, 876-877, enforced, *N. L. R. B.* v. *Parker Bros.*, 209 F. 2d 278 (C. A. 5, 1954). The Board itself has actually made the *Columbian Enameling* rule more stringent over the years. See *Mike Persia Chevrolet Co., Inc.*, 107 NLRB 377, 379-380; *The C. L. Bailey Grocery Company*, 100 NLRB 576. In two cases involving questions of employer associations and single employers, similar to the instant case, the Board in one held a request for bargaining insufficient because it failed to specify whether single or multi-employer bargaining was requested (*P & V Atlas Industrial Center, Inc.*, 112 NLRB 1175, 1178), and in the other, the Board held a request inadequate because it was addressed to one employer in the multi-employer group (*Lyon Van & Storage Co.*, 123 NLRB 734). In its amended complaint in the instant case the Board charged that *an employer association* had made the request and that the appropriate bargaining unit was association-wide. The petitioner denied that there was an employer association and alleged that the single employer unit was appropriate. It denied that the alleged association had made a request for bargaining. Because the Board itself has established the rule

considered this issue so material that he recommended dismissal of the entire complaint on the basis of his finding that there was no evidence in the record of a request for bargaining by the association. Because the Board stated no contrary findings or reasons for rejecting the examiner's finding, there is no way to know whether the Board is relying upon evidence in the record or whether this decision marks a scrapping or diluting of the *Columbian Enameling* rule. The Board should not be permitted to leave to speculation the basis for its reversal of the examiner's findings. The second issue was raised by the petitioner's affirmative defense that the individual employer had engaged in conduct which effectively prevented bargaining. Under the cases this would, if proven, have constituted a meritorious defense.[18] The examiner considered it unnecessary to rule upon this in view of his recommendation to dismiss the complaint on the other ground. The petitioner however preserved this defense by an appropriate exception filed with the Board.[19] As noted above, the Board made

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that a request for bargaining is not sufficient unless it identifies the appropriate unit, the petitioner was clearly raising a substantial issue in asserting that no request for bargaining was made *by the association*. *Cf. C. L. Bailey Grocery Co.*, 100 NLRB 576, 579, where the Board said in considering the sufficiency of a request to bargain: "* * * we do not believe it incumbent on an employer to resolve an ambiguity in a request to bargain. On the contrary, we believe that a union representative, who is presumably versed in labor matters, should clearly define the unit for which recognition is sought. Such a requirement imposes on the union representative only the obligation to say what he means. Failing to do so, he cannot be considered as having made the sort of request to bargain which imposes upon an employer a legal obligation to comply. It is not a nice rigidity, as our dissenting colleagues call it, for the Board to require that those who invoke its services should first fulfill their own obligations."

18. See, *N. L. R. B.* v. *Lambert*, 250 F. 2d 801 (C. A. 5, 1958); *N. L. R. B.* v. *Express Publishing Company*, 128 F. 2d 690 (C. A. 5, 1942); *N. L. R. B.* v. *San Angelo Standard*, 228 F. 2d 504 (C. A. 5, 1955); and see *Timken Roller Bearing Co.* v. *N. L. R. B.*, 161 F. 2d 949 (C. A. 6, 1947).

19. See *Appendix to Brief for Respondent*, p. 109, § 3, and *Appendix to Board's Brief*, p. 134, VIII, referred to in f.n. 2 supra.

no finding on this defense and the court below made no comment upon the Board's omission. Since either of the issues could have been decisive, they were clearly material and required express findings by the Board.

The Board decides hundreds of cases annually.[20] The decisions of other circuit courts, contrary to the decision below, have required the agencies to adhere strictly to the Administrative Procedure Act in the making of findings and the statement of reasons, particularly where an examiner's findings have been rejected by the agency. In each case coming before the Board it must choose whether and to what extent it will observe, ignore, or avoid the often difficult task of making responsible findings. In this real sense the conflict between the decisions of the other circuits and the case below represents a serious problem in the administration of the National Labor Relations Act, which in our opinion warrants the issuance of a writ of certiorari.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted

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20. The scope and importance of this problem is manifest from the great number of decisions issued by the Board alone. The Board reported that it had issued 2101 complaints and 764 decisions in unfair labor practice cases in the single fiscal year ending June 30, 1959, *Twenty-Fourth Annual Report of the National Labor Relations Board*, Table 3, p. 163.

APPENDIX A.

National Labor Relations Act, 61 Stat. 136, 29 U. S. C. §§ 151 et seq., Sec. 10(c).

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. *If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact* and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of section 8 (a) (1) or section 8 (a) (2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. *If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in*

any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed. (Italics added.)

Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. §§ 1001 et seq.

§ 1007 (b) Prior to each recommended, initial or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. *The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions* (including initial, recommended, or tentative decisions) *shall become part of the record and include a statement of* (1) *findings and conclusions as well as the reasons or basis therefor, upon all the material issues of fact, law or discretion pre-*

sented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof. (Italics added.)

§ 1009 (e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) *arbitrary, capricious, an* abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

National Labor Relations Board Rules and Regulations and Statements of Procedure, Series 8, 1959. 24 F. R. 9095, Sec. 101.12.

SEC. 101.12 *Board decision and order.*—(a) If any party files exceptions to the intermediate report, the Board, with the assistance of the legal assistants to each Board member who function in much the same manner as law clerks do for judges, reviews the entire record, including the trial examiner's report and recommendations, the exceptions

thereto, the complete transcript of evidence, and the exhibits, briefs, and arguments. The Board does not consult with members of the trial examining staff or with any agent of the general counsel in its deliberations. It then issues its decision and order in which it may adopt, modify, or reject the findings and recommendations of the trial examiner. The decision and order contains detailed findings of fact, conclusions of law, and basic reasons for decision on all material issues raised, and an order either dismissing the complaint in whole or in part or requiring the respondent to cease and desist from its unlawful practices and to take appropriate affirmative action.

APPENDIX B.

INTERMEDIATE REPORT.

STATEMENT OF THE CASE.

On November 13, 1957, Frederick W. Turner, Jr., filed a charge in Case No. 13-CB-541 that the Company [Chicago Stevedoring Co., Inc.] participated in the negotiation of an agreement with Local 19 on May 15, 1957; that the agreement became effective May 16, 1957, for a 3-year period; that the Company has complied with the terms of that agreement and that since May 16, 1957, the Company has made numerous oral and written requests for the execution of a contract by the Union but the Union has refused and continues to refuse to execute a contract with the Company despite the fact that it has executed contracts with all other employers participating in the negotiations with the Union.

On November 18, 1957, a first amended charge was filed. The only difference between the charge and the first amended charge is that the former was filed by an individual and the latter was filed by Chicago Stevedoring Co., Inc. In Case No. 13-CB-641 a charge was filed on April 14, 1958, by Chicago Stevedoring Co., Inc., setting forth that the existing collective bargaining agreement was negotiated and has for a number of years been negotiated by the Union and a multiemployer group; that the Employer (Chicago Stevedoring Co., Inc.) participated in the negotiation of said agreement and has conformed to its terms as a member of the multiemployer group; that the Union has refused and continues to refuse to submit said agreement to the Employer for execution; that on April 11, 1958, the Union

again refused to submit the multiemployer agreement to the Employer for execution but instead sought to bargain about wage rates; that the Union thereby refused to execute the written contract embodying the agreement between the Employer and the Union in violation of its duty to bargain in good faith under Section 8(d) and Section 8(b) (3) of the Act.

On July 18, 1958, the General Counsel through the Acting Regional Director for the Thirteenth Region issued an order consolidating the above cases and a consolidated complaint which alleged inter alia, that on or about May 15, 1958, and at various times thereafter, Chicago Stevedoring Co., Inc. (herein called the Company), requested Local 19, International Brotherhood of Longshoremen, AFL-CIO (herein called the Respondent) to bargain collectively with respect to rates of pay, wages, hours of employment and other terms and conditions of employment with the unit alleged to be appropriate, and that on or about May 15, 1958, and at all times thereafter the Respondent refused and continues to refuse to bargain collectively with the Company by adamantly demanding and insisting that the Company agree to a provision in the collective bargaining agreement which grants to the Respondent jurisdiction over certain work which the Company does not perform which provision the Company had repeatedly declined to include in said collective bargaining agreement and that by such acts the Respondent has refused to bargain, thereby violating Section 8 (b) (3) and Section 2 (6) and (7) of the Act.

On August 28, 1958, the General Counsel issued an amended complaint alleging that the Company since on or about May 13, 1957, has been a member of a voluntary association (herein called the Association) composed of approximately 11 named employers who at all times material herein are and have been engaged in businesses which use, among other things, the services of stevedores and other

employees whose function it is to transfer and handle commodities, goods, wages and merchandise. The amended complaint alleged that the Association has negotiated on behalf of its members collective bargaining agreements with the Respondent relating to the wages, hours and other terms and conditions of employment of the stevedores and other employees of the members of the Association and that upon reaching agreement, the individual members of the Association have executed separate identical agreements with the Respondent. The amended complaint further alleged that all employees of the members of the Association, including the employees of the Company, with the exception of all clerical, professional, guards, house checkers, supervisory employees (superintendents, foremen, straw bosses, two board bosses and gang leaders) who are engaged in all work affecting directly or indirectly the following operations: (a) all fitting up, rigging up and assembling of all cargoes; (b) all work from the hold of a vessel through house to railroad car, truck or upper floors in warehouse to its final resting place in said warehouse or in removing cargo from the warehouse up to, on and into the hold of the vessel, truck or car or vice versa; (c) all winches, conveyances or conveyors pertaining to (a) and (b) above; constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

The amended complaint further alleged that the Respondent has been the statutory representative of all the employees in said unit. The amended complaint alleged further that on or about May 13, 1957, and at various times thereafter, the Association on behalf of its members, including the Company, requested the Respondent to bargain collectively with respect to the employees in said unit and that on or about May 17, 1957, the Association on behalf of its members, including the Company and the Respondent on behalf of the employees of the members of the Association,

including the employees of the Company, reached an agreement on all of the terms of collective bargaining agreement relating to wages, hours and other terms and conditions of employment of the employees in said unit alleged to be appropriate, except with respect to the jurisdiction of work to be handled by employees of the Company. The amended complaint further alleged that the Respondent, in violation of Section 8 (b) (3) and Section 2 (6), (7) of the Act, refused to bargain collectively with the Association as the exclusive representative of its employees in the said unit by (a) demanding and insisting as a condition precedent to its signing the agreement with the Company that the Company agree to a provision in said collective bargaining agreement which grants to the Respondent jurisdiction over certain work which the Company does not perform, which provision the Company had repeatedly declined to include in said bargaining agreement; and (b) by demanding and insisting that changes be made in the terms and conditions of the said collective bargaining agreement although such terms and conditions had been agreed to previously.

The answer to the amended complaint denied the commission of any unfair labor practice and further denied that the Company since on or about May 13, 1957, is a member of a voluntary Association; denied as alleged in the complaint that the Association has negotiated collective bargaining agreements with the Respondent and upon reaching agreement the individual members of the Association have executed separate identical agreements with the Respondent; denied the allegation that all the employees of the members of the Association as described constitute an appropriate unit, but affirmatively alleged that the unit described in the amended complaint describes a separate bargaining unit among the employees of each of the separate employers; and that further the Company is wholly or substantially owned or controlled by Wacker Warehouse Co.,

Inc., and so operates in conjunction with Wacker Warehouse Co., Inc., as to constitute it a single employer within the meaning of the Act. The answer admitted that the Respondent is the representative for purposes of collective bargaining of all employees in each of the separate bargaining units but Respondent denied that a single bargaining unit exists as described in the complaint. The answer admitted that on or about May 17, 1957, the Respondent reached agreement with various individual stevedoring employers but not including the Company. The Respondent further averred that at all times material, the Company has failed and refused to meet and negotiate with the Respondent in good faith by (a) refusing to meet and negotiate with Respondent during the pendency of unfair labor practice charges; (b) refusing to negotiate with respect to wages and (c) refusing to negotiate with respect to other issues which are included within the scope of rates of pay, wages, hours of employment and other conditions of employment; and that by the Company's conduct, it has in bad faith prevented and delayed the execution of an agreement with the Respondent.

Pursuant to notice a hearing was held in Chicago, Illinois, on September 18, 19, 22 and 23, 1958, before W. Gerard Ryan, the undersigned Trial Examiner. All parties were represented by counsel at the hearing and were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce relevant evidence, to present oral argument and to file briefs as well as proposed findings of fact and conclusions of law. Briefs have been received from the General Counsel, the Charging Party and the Respondent which I have considered.[1]

Upon the entire record in the case and from my observation of the witnesses, I make the following:

1. The time for briefs was extended by the Acting Chief Trial Examiner to November 17, 1958.

Findings of Fact.

I. The Company's Business; the Union as a Labor Organization.

The complaint alleged and the answer admitted facts which I find established that Chicago Stevedoring Co., Inc., an Illinois corporation, is engaged in commerce within the meaning of the Act, and that the Respondent Union is a labor organization within the meaning of the Act.

II. The alleged refusal to bargain.

The amended complaint alleged and the answer denied that on or about May 13, 1957, and at various times thereafter, the Association on behalf of its members, including the Chicago Stevedoring Co., Inc., requested the Respondent to bargain collectively with respect to rates of pay, wages, hours of employment and other terms and conditions of employment with respect to the employees in an alleged appropriate unit.

The General Counsel stated as a bill of particulars that written demands by the Association for bargaining were made on or about March 15, 1957, May 13, 1957, August 22, 1957 (by Chicago Stevedoring Co., Inc.), November 6, 1957, and March 24, 1958; and that oral requests to bargain were made by Chicago Stevedoring Co., Inc., as a member of the Association or by Frederick W. Turner, Jr., as a representative of the Association and a representative of one of its constituent members, Chicago Stevedoring Co., Inc., on May 15, 16, 17, 1957: July 22, 1957, and April 11, 1958.

Wacker Warehouse Company and the Respondent had a collective bargaining agreement which expired in May, 1957. Wacker Warehouse Company decided to discontinue its stevedoring operations and Chicago Stevedoring Co., Inc., was incorporated on May 13, 1957, and began stevedoring operations on the same premises that stevedoring work had

been performed by the Respondent during its contract with Wacker Warehouse Company. On May 13, 1957, during the course of the negotiations between the multiemployer group and the Respondent, Chicago Stevedoring Co., Inc., joined the other stevedoring companies in the then current negotiations at the offices of the Federal Mediation and Conciliation Service. On May 16, 1957, during the negotiation meeting, Irving M. Friedman, attorney for the Respondent, inquired if the Respondent was going to do the same work that it had done for Wacker Warehouse Company. Frederick W. Turner, Jr., attorney for Chicago Stevedoring Co., Inc., and spokesman for the employers at the negotiation meetings, replied he would rather have Henry G. Marsh (president and treasurer of Chicago Stevedoring Co., Inc.,) answer that question directly. When Marsh came in he was asked if he was going to operate stevedoring work as Wacker Warehouse Company had operated before Chicago Stevedoring Co., Inc., took over. He replied, "As far as I know, yes; but I cannot give you any commitment because there is a problem concerning sugar that is kept over the free period." Marsh was then asked if he was going to give the Union a hard time about something that was settled a long time ago with Wacker Warehouse Company. He replied, "I cannot answer that, I don't even fully understand what your problem is," and the discussion was then deferred until later.

The relationship, if any, between Wacker Warehouse Company and Chicago Stevedoring Co., Inc., with which the Respondent was concerned, was one of the reasons why the Respondent was insisting on having a "successors and assigns" clause written into the proposed collective bargaining agreement. It is clear from the record that the discussion surrounding that clause, which was finally included in the contract, did delay the negotiations with the other employers.

On May 17, 1957, after an all night session at the offices of the Federal Mediation and Conciliation Service, the Respondent was given an ultimatum by the employers that the Respondent must withdraw certain demands and defer for another occasion any further discussion of the Wacker Warehouse Company and Chicago Stevedoring Co., Inc., situation. The employers and the Respondent then sat down together in one room where further discussions were had which resulted in a memorandum agreement which was to include a clause to take Wacker Warehouse and Chicago Stevedoring Co., Inc., entirely out of those negotiations so that the other employers and the Respondent could arrive at an agreement. The concluding paragraph of that memorandum (G. C. Ex. 2) was drafted to cover that agreement and read as follows:

> Agreement with respect to Chicago Stevedoring Company only is subject to mutual agreement concerning the jurisdiction of work formerly at Wacker Warehouse, now at Chicago Stevedoring Company, handled by Local 19 under agreement expiring May 15, 1957.
>
> For the Union:
> IRVING M. FRIEDMAN.
>
> For the Companies:
> FREDERICK W. TURNER, JR.
>
> Witnessed:
> WILLIAM G. MURRAY,
> *Commissioner Federal Mediation and Conciliation Service.*

Up to that point it is clear that the Respondent had not refused to bargain with the Association (assuming arguendo that an association of employers did exist) for it was at the insistence of the other employers on May 16, 1957, that the particular problems with respect to Chicago Stevedoring Co., Inc., and the Respondent were deferred for another occasion so that, with the discussions regarding Chi-

cago Stevedoring Co., Inc., out of the way for the time being, a contract with the remaining employers could more speedily be arrived at.

It is also clear that further negotiations were anticipated because after the memorandum agreement had been signed, Henry G. Marsh, president and treasurer of Chicago Stevedoring Co., Inc., who represented Chicago Stevedoring Co., Inc., at the meeting, said to Irving Friedman, attorney for the Respondent, that he would like to continue operating and not be struck while this is going on. Friedman replied, "As far as I am concerned in speaking for the Union I am quite certain that you won't have a problem, why don't we do this and I will go and talk to the Union and give you an assurance right now on it; why don't you operate as if the same agreement had been negotiated between your company and local 19 as is in the memorandum. We can meet subsequently, in the meantime you needn't worry about a work stoppage." That arrangement was acceptable to the Respondent. I find merit in the Respondent's contention that Article 15 of the memorandum of agreement, above referred to, constituted an agreement to bargain at a later date. Such conclusion is buttressed by the agreement between Marsh and Friedman that no strike would occur in the meantime.

Subsequent to May 17, 1957, there is no evidence in the record that the Association ever requested the Respondent to bargain further. Whatever requests are in the record were requests from Chicago Stevedoring Co., Inc., and not from the Association. Thus the day next alleged in the bill of particulars when the Association requested the Respondent to bargain is August 22, 1957. That request, however, is not from the Association but in a letter of the same date from the Chicago Stevedoring Co., Inc., in which no mention is made of any association. The letter dated November 6, 1957, is a letter from Frederick W. Turner, Jr., re-

ferring to his client, Chicago Stevedoring Co., Inc., without reference to an association. In similar vein are the letters from Turner to Friedman dated November 29, 1957, and March 24, 1958. With respect to the oral requests alleged in the bill of particulars to have been made to the Respondent by an association, there is no evidence of any oral demands ever having been made.

Thus I find there is no evidence in the record to support the allegations in the amended complaint and the statements in the bill of particulars that the Association requested the Respondent to bargain with it and that the Respondent failed and refused to bargain. Without a request to bargain on the part of the Association on and after May 17, 1957, there can be no refusal to bargain with the Association on the part of the Respondent. Whatever requests were made of the Respondent to bargain with respect to a contract with Chicago Stevedoring Co., Inc., were made by Chicago Stevedoring Co., Inc., or by Turner, as attorney for Chicago Stevedoring Co., Inc. The record fails to disclose any requests to bargain by Turner as a representative of an association.

Accordingly, I find that in the absence of any requests by an association, the Respondent did not refuse to bargain with the Association on and after May 17, 1957. Nor did it refuse to bargain prior to May 17. On May 16 and 17, 1957, as shown above, the Respondent was discussing in negotiation sessions, the situation involving Chicago Stevedoring Co., Inc., and it was the employer group that insisted that the problems of Chicago Stevedoring Co., Inc., and the Respondent be deferred until later.

In view of the above finding that the Respondent did not refuse to bargain with the Association because the Association did not request the Respondent to bargain, it becomes unnecessary to determine other issues presented in

the record such as the appropriateness of the bargaining unit; whether the Respondent represented the employees in such unit; whether Chicago Stevedoring Co., Inc., is a successor to Wacker Warehouse Company; or whether Wacker Warehouse Company and Chicago Stevedoring Co., Inc., are, on the facts of this record, a single employer for the purposes of bargaining. I shall recommend that the amended complaint be dismissed in its entirety. I base that recommendation solely on the point that assuming, arguendo and without deciding, that an association of employers did exist as alleged, the Respondent cannot be held to have refused to bargain because the record fails to contain any evidence that such an association requested or demanded that the Respondent bargain with the association.

Upon the basis of the foregoing findings of fact and on the entire record, I make the following:

Conclusions of Law.

1. Respondent, Local 19, International Brotherhood of Longshoremen, AFL-CIO, has not engaged in any unfair labor practices within the meaning of Section 8(b) (3) and Section 2 (6) and (7) of the Act.

Recommendations.

Upon the basis of the foregoing findings of fact and conclusions of law and upon the entire record of the case, I recommend that the amended complaint be dismissed against the Respondent, Local 19, International Brotherhood of Longshoremen, AFL-CIO, in its entirety.

Dated at Washington, D. C., this 10th day of Dec. 1958.

(s) W. Gerard Ryan,
Trial Examiner.

Decision and Order.

On December 10, 1958, Trial Examiner Gerard Ryan issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had not engaged in unfair labor practices as alleged in the amended complaint, and recommending that the complaint be dismissed in its entirety. Thereafter, the General Counsel, the Respondent, and the Charging party[1] filed exceptions to the Intermediate Report and supporting briefs.

The amended complaint alleges, inter alia, that Respondent did and continues to refuse to bargain collectively with a voluntary association (herein called the Association) by demanding as a condition precedent to signing the agreement with Chicago Stevedoring, a member of the Association, that it agree to grant to the Respondent jurisdiction over work which that Company does not perform and that such request has been repeatedly rejected.

The Trial Examiner found that an agreement signed by Frederick W. Turner, Jr., as the representative of the Association on May 17, 1957, removed Chicago Stevedoring from the then current contract negotiations and was an agreement to bargain concerning Chicago Stevedoring only at a later date. He further found that assuming, arguendo, and without deciding, that an association of employers did exist, there was no evidence that the Association thereafter requested Respondent to bargain with the Association concerning Chicago Stevedoring. In the absence of any request by the Association he found that the Respondent did not refuse to bargain with the Association on or after May 17, 1957, and recommended that the complaint be dismissed in its entirety. In view of this recommendation, the Trial Examiner found it unnecessary to determine either

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1. Herein sometimes called Chicago Stevedoring.

the appropriate bargaining unit or the relationship of Chicago Stevedoring to Wacker Warehouse.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in this case.[2] Because of the extent of our disagreement with the Trial Examiner, we make our own findings, conclusions, and order, as follows:

Findings of Fact.

1. The business of the company.

Chicago Stevedoring Co., Inc., is an Illinois corporation with its office in Chicago, Illinois, where it is engaged in the stevedoring business. During the 12-month period ending June 30, 1958, it received approximately $203,000 for services rendered to various companies which annually ship goods in value between two and three billion dollars directly from out of the State into the State of Illinois. We find that Chicago Stevedoring is engaged in commerce within the meaning of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

In the early part of May, 1957, Chicago Stevedoring leased a portion of the Wacker Warehouse dock space as well as stevedoring equipment from Wacker Warehouse. As the office of Chicago Stevedoring is located away from the dock area, arrangement was made to have Wacker Warehouse perform certain daily clerical duties for which Chicago Stevedoring performs work formerly done by freight handled. The Respondent contends that because Chicago Stevedoring perform work formerly done by

2. The Charging Party's request for oral argument is hereby denied. The record, the exceptions, and the briefs, in our opinion, adequately present the issues and the positions of the parties.

Wacker Warehouse and leases its dock and equipment from Wacker Warehouse, Chicago Stevedoring and Wacker Warehouse constitute a single employer or that Chicago Stevedoring is the successor to Wacker Warehouse. We do not agree. The record shows that neither corporation has any financial interest in the other; no officer, stockholder, or director is the same; there is no interchange of employees; different skills are exercised by the employees of each company, and the only relationship between the companies is that established by the written lease agreement. We find that Chicago Stevedoring exercises complete autonomy in using leased equipment and in dealing with its own employees. On this evidence and the record as a whole, we find that Chicago Stevedoring does business with Wacker Warehouse as an independent contractor.

II. The respondent labor organization.

Local 19, International Brotherhood of Longshoremen, AFL-CIO, herein called the Respondent, is a labor organization within the meaning of the Act.

III. The Appropriate Unit.

The amended complaint alleges that Chicago Stevedoring is, and since May 13, 1957, has been a member of a voluntary association comprised of approximately eleven employers engaged in stevedoring operations,[3] and that

3. Maritime Services, Ltd.
Interstate Contracting Corp.
Chicago Stevedoring Co., Inc.
Chicago Calumet Stevedoring Co.
Lake Michigan Corporation
Seaway Stevedoring Co.
Time, Inc.
The Tribune Co.
Chicago Daily News
International Steamship Terminals
Great Lakes Stevedoring Co.

this association on May 17, 1957, reached an agreement with the Respondent on all terms relating to the wages, hours, and other conditions of employment of the employees in the appropriate association-wide unit, except with respect to the jurisdiction over the work to be handled by Chicago Stevedoring. The Respondent denies the existence of an employer association and that there has been multi employer bargaining. It contends, in effect, that each employer bargained individually as part of a group.

There is no formally organized employer association. However, for the past 20-25 years, all employers in the Chicago area engaged in stevedoring operations have met together with the Respondent to negotiate bargaining contracts. Near the expiration date of the contracts, negotiations have been initiated by the Respondent's asking all companies employing stevedores within the area to set a mutually satisfactory date for meeting to discuss the terms of a new contract. Prior to the established date, the employer representatives have met together and drafted a joint proposal which they submit at the first meeting with the Respondent, at which time each employer has received a copy of the Respondent's proposals. Thereafter, the employer representatives have met together, discussed the Respondent's proposals, and determined, by majority vote, their position and course of action. At subsequent meetings with the Respondent, one of the employer representatives has acted as the principal spokesman for the group. Frederick W. Turner, Jr., an attorney, appears to have performed this role during the past few years. However, the record shows that at times other company representatives have discussed, on behalf of the group, particular phases of the contract with the Respondent.

Although the companies had a unity of interest and one of their representatives acted as principal spokesman, there does not appear to have been an explicit understand-

ing that their spokesman had the authority to bind the others. Nevertheless, all employers have obviously felt themselves bound by the final negotiations, since for a number of years all contracts executed with the stevedoring companies in that area have been uniform. The record shows that the stevedoring companies have joined together under one or more principal spokesmen for the purpose of advising and consulting among themselves respecting bargaining negotiations with the Respondent, and have established, both among themselves and in their common negotiations with the Respondent, a unity of action for arriving at the identical contract terms relating to wages, hours, and working conditions which each company's contract has contained. A health and welfare fund has been established by the Respondent and these employers. Three trustees from this employer group represent all the employers engaged in stevedoring in the Chicago area in the joint administration of this fund with three trustees appointed by the Respondent.

During the 1957 negotiations, the usual procedure as described above, was followed. When the Respondent was notified, on May 13, 1957, that Chicago Stevedoring intended to engage in stevedoring operations, it suggested that Company "join the other stevedoring companies in the current negotiations at the Federal Mediation Service offices", and the Company did so. On May 17, the results of the negotiations were embodied in a written agreement between the "Contracting Stevedoring Companies" and the Respondent, and signed by Frederick W. Turner, Jr. "For the Companies". Thereafter, the Respondent executed identical individual contracts with each of the stevedoring companies except Chicago Stevedoring, the charging party herein. Heretofore, the Respondent had always executed such contract with all companies participating in the negotiations.

In the light of the foregoing facts and the record as a whole, we find that the stevedoring companies associated themselves for the purposes of joint collective bargaining into a single multiemployer group, and such joint participation in negotiations, in our opinion, evinces an intent to be included in a multiemployer unit.[4]

Accordingly, we find the following unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act:[5]

> All employees of the members of the Association including the employees of Chicago Stevedoring Co., Inc., who are engaged in all work affecting, directly or indirectly, the following operations:
>
> (a) All fitting up, rigging up, and assembling of all cargoes;
>
> (b) All work from the hold of vessel through house to railroad car, truck, upper floors, in warehouse, to its final resting place in said warehouse, or in removing cargo from the warehouse, up to, on and into the hold of the vessel, truck or car or vice-versa;
>
> (c) All winches, conveyances, or conveyors pertaining to (a) and (b) above;

but excluding all clerical and professional employees, guards, house checkers, and supervisors (superintendents, foremen, straw bosses, two or tow[6] board bosses, and gang leaders) as defined in the Act.

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4. United Productions of America, 111 NLRB 390, 393; Atlas Storage Division, P & V Atlas Industrial Center, Inc., 110 NLRB 1413; American Publishing Corporation, et al., 121 NLRB No. 21, at p. 9 (also see footnote 28 therein) and The Evans Pipe Company, et al., 121 NLRB No. 5, and cases cited in footnote 16 therein.

5. See Eastern Massachusetts Street Railway Company, 110 NLRB 1963, 235 F. 2d 700.

6. This exclusion is referred to in the contracts as both "two board bosses" and "tow board bosses."

IV. The Refusal to Bargain.

When Chicago Stevedoring notified the Respondent on May 13, 1957, of its intent to engage in stevedoring activities, formerly performed by Wacker Warehouse, and requested a contract, the Respondent invited it to join the other stevedoring companies in the current negotiations. At all subsequent negotiation meetings, Chicago Stevedoring was represented by its attorney, Frederick W. Turner, Jr., who also represented several other stevedoring operations. Eventually, at the May 17, 1957 meeting, agreement was reached on all issues except one—and this issue related solely to Chicago Stevedoring and the Respondent. At the suggestion of the Conciliator from the Federal Mediation Service, a memorandum of agreement was executed by Frederick W. Turner, Jr., for the Companies, with a paragraph, numbered 15, dealing with the remaining issue between Chicago Stevedoring and the Respondent, which read as follows:

> Agreement with respect to Chicago Stevedoring Company only is subject to mutual agreement concerning the jurisdiction of work formerly at Wacker Warehouse, now at Chicago Stevedoring Company, handled by Local 19 under agreement expiring May 15, 1957.

Thereafter, the Respondent tendered contracts to all other employers in the Association, each contract containing identical provisions in accordance with the terms of the memorandum of agreement and which were executed by the employers. Chicago Stevedoring has repeatedly requested an identical contract, but the Respondent has refused to execute a contract with Chicago Stevedoring until certain assurances are made by Chicago Stevedoring and/or Wacker Warehouse with respect to work performed by the warehouse.

The Trial Examiner found that the paragraph numbered

15, above, so far as Chicago Stevedoring was concerned, constituted an agreement to bargain at a later date, and entirely removed Chicago Stevedoring from the negotiations. We do not agree. The unequivocal terms of paragraph 15 reserve only the issue of work jurisdiction to be "negotiated", and the clear implication is that the Respondent and Chicago Stevedoring, as a member of the employer group, had agreed to all the terms established by the memorandum of agreement.

Until 1953, Wacker Warehouse was engaged solely in operating a licensed, public warehouse recognizing the Miscellaneous Warehousemen's Union, Local 781, as the representative of its warehousing employees. In 1953, it took over an existing stevedoring operation which had been operated on its dock by a tenant.

In 1954, Wacker Warehouse negotiated a contract which it executed and returned to the Respondent with a letter purporting to confirm an understanding allegedly reached between Respondent and the Warehousemen's Union, the bargaining representative of the warehouse employees, to the effect that Respondent's "work jurisdiction"[7] was so modified that Wacker could continue its practice of using members of the Warehousemen's Union, pursuant to its contract with their union, to move merchandise after it had

7. Article I. The employer recognizes Local No. 19 as the sole, exclusive bargaining representative of all its Employees, with the exception of all clerical, professional, guards, housecheckers, supervisory employees (Superintendents, foremen, strawbosses, tow board bosses and gang leaders) who are engaged in all work affecting directly or indirectly the following operations:

(a) * * *

(b) All work from the hold of vessel, through house to car, truck or upper floors, in warehouse, to its final resting place in said warehouse, or in removing cargo from the warehouse, up to, and into the hold of the vessel, *truck or car or vice versa.

* per letter attached.

[No letter attached]

been warehoused. No reply was made by the Respondent to the confirmation letter or to the request that it execute the exception, as submitted by Wacker Warehouse, in writing. However, its stevedoring employees continued to work under those exceptions.

During the negotiations of the 1955 contract, the Respondent refused to put the exception to the contract in writing, but agreed to permit Wacker Warehouse to continue to operate as it had been. Sometime later in 1955, the Respondent struck Wacker Warehouse to compel the assignment of the excepted work to stevedores. Respondent claimed the right to move marine freight out of the warehouse after it had been warehoused. Wacker Warehouse's contract with the Warehousemen covered all movements of freight after it had been warehoused. In order to settle the strike, Wacker Warehouse was forced to cease warehousing marine freight. Then, at the expiration of its 1955 contract with the Respondent, Wacker Warehouse decided to confine its operations exclusively to operating a licensed, bonded warehouse and discontinue stevedoring operations.

Hearing of this decision, Marsh, an independent contractor who performed sales work for Wacker Warehouse as well as for many other warehousing operations in the Chicago area, and Johnson, a foreman of Wacker Warehouse's stevedoring operations, entered into a contract with Wacker leasing a portion of the warehouse dock and equipment to engage in the stevedoring business.

Thus, the controversy which caused Wacker Warehouse to discontinue stevedoring operations was the "work jurisdiction issue" referred to in the May 17 memorandum of agreement between the Association and the Respondent. As a condition of signing the contract with Chicago Stevedoring, the Respondent insisted that assurance be obtained from Wacker Warehouse that it would grant to Chicago

Stevedoring, or, at Wacker's option, to any other firm under contract with the Respondent, the work of moving marine freight out of the warehouse.[8] If performed by Chicago Stevedoring this work would have fallen within the coverage of the contract proposed to Chicago Stevedoring by the Respondent.

8. The following letter was prepared by Friedman, counsel for Respondent, to be executed by Wacker Warehouse and approved by Chicago Stevedoring, and returned to him. At which time, he agreed, the Respondent would tender the contract to Chicago Stevedoring. The letter was not signed by either Wacker Warehouse or Chicago Stevedoring.

October 10, 1957

Local 19, International Brotherhood
of Longshoremen, AFL-CIO
Chicago, Illinois

GENTLEMEN:

As we previously advised you, Wacker Warehouse, Inc., is presently having all of its marine work handled by Chicago Stevedoring Co., Inc. We are aware that your union and Chicago Stevedoring Co., Inc. have been discussing a contract for several months without any agreement having been reached. For business reasons of our own we are vitally interested in good contractual relations being established between your union and Chicago Stevedoring Co., Inc. at the earliest possible date. Accordingly, after consulting with Chicago Stevedoring Co., Inc. we make the following representation and commitment to you, as an inducement to you to accept the contract offer of Chicago Stevedoring Co., Inc.:

Wacker Warehouse Co., Inc. will continue in the future to contract exclusively with Chicago Stevedoring Co., Inc., or, at its option with any other stevedoring contractor which is under contract with your union for the handling of all marine work. This of course includes all work coming within the terms of Article I of the Articles of Agreement to be entered into between Chicago Stevedoring Co., Inc. and your union. It is expressly understood that the foregoing includes all types and classes of work presently being performed by your union at the premises occupied by Wacker Warehouse Co., Inc. and/or Chicago Stevedoring Co. such as, for example, all movement of marine merchandise in, into, about and out of any of the foregoing premises, or from the said premises to truck, rail car or marine transportation, regardless of

(*Footnote continued on following page.*)

The General Counsel contends that the insistence by the Respondent that any contract with Chicago Stevedoring include the assurance that the work jurisdiction provision in the contract will be interpreted to include work which has heretofore been performed by another employer's employees is outside the scope of "mandatory bargaining" and therefore a refusal to bargain within the meaning of Borg Warner.[9] In that case, the Supreme Court held that the refusal to sign a contract unless it contained certain clauses dealing with matters outside the category of subjects specified by the Statute, i.e. "wages, hours, and other conditions of employment," was a refusal to bargain on the mandatory or statutory subjects. Insistence on such clauses was held tantamount to a refusal to bargain on those subjects on which the law requires bargaining because the Statute requires the execution of a written contract incorporating any agreement reached on such mandatory subjects, if requested by either party. Clearly, the scope of another employer's operation, or the terms and con-

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whether such merchandise is in the custody of Wacker Warehouse Co., Inc. for storage, warehouse, or other purposes, or in the custody of Chicago Stevedoring Co., Inc. (or any other stevedoring contractor as set forth herein above).

We have advised Chicago Stevedoring Co., Inc. of the foregoing, and that Company had affixed its signature hereto to indicate its express understanding that the work hereinabove described is within the terms of Article I of the Articles of Agreement.

Very truly yours,

WACKER WAREHOUSE CO., INC.

By .....

President.

Accepted:

CHICAGO STEVEDORING CO., INC.

By .....

President.

9. While this letter seems to assume that the work of transfer of freight from the warehouse was currently being performed by stevedores of Chicago Stevedoring, it is clear from the record, as noted above, that no such work was being done by any employees. *N. L. R. B.* v. *Wooster Division of Borg-Warner*, 356 U. S. 342.

ditions of employment of another employer's employees who are themselves outside the bargaining unit, are not proper subjects for mandatory bargaining.

The Respondent contends that the proposed work jurisdiction was merely a demand that the Respondent's members continue to perform the sought after work. Implicit in this contention is the claim that their members were, in fact, removing warehoused marine freight to cars and trucks from its final resting place in Wacker Warehouse. The record does not support the Respondent's claim. A strike had been called by Respondent to compel Wacker Warehouse to use members of the Respondent to perform work which, under its contract with the Warehousemen's Union, was being performed by members of the Warehousemen's Union. In order to settle the strike, Wacker Warehouse agreed not to, and after the settlement did not, warehouse any marine freight. The record shows that, after the strike, when Chicago Stevedoring unloaded marine freight, it was moved from the dock directly to the cars and trucks through the warehouse, without coming to rest in the warehouse.

Thus the evidence clearly establishes that the Respondent is and has been insisting as a condition precedent to the execution of any contract with Chicago Stevedoring that it furnish a guarantee in the form described above, by Wacker Warehouse of the Respondent's jurisdiction over work not heretofore performed by the employees of Chicago Stevedoring nor, since the strike settlement, by the employees of Wacker Warehouse, to-wit, the moving of marine freight into trucks and cars after it has been warehoused by Wacker Warehouse. Chicago Stevedoring has repeatedly told the Respondent that it was impossible for it to give such a guarantee as requested by the Respondent.

The fact that the consummation of bargaining with Chicago Stevedoring was conditioned by Respondent upon

the furnishing of a guarantee which could come only from Wacker, another employer, not subject to the control of Chicago Stevedoring, is in itself sufficient reason to find that the Respondent failed to discharge its statutory bargaining obligations.

Moreover, even if we assume that Chicago Stevedoring might have prevailed upon Wacker Warehouse to furnish such guarantee to the Respondent, we would still find that the Respondent has violated Section 8 (b) (3) of the Act by conditioning its contract with Chicago Stevedoring upon obtaining a commitment from Wacker regarding future work assignments which would have impinged upon the terms of the existing contract between Wacker and its employees. Such a commitment would necessarily have involved recognition of the Respondent by Wacker for purposes of regulating the condition of work of its employees, even though the Respondent did not represent such employees. Thus, compliance with Respondent's "work jurisdiction" demand would have required Wacker to engage in an unfair labor practice—recognition of a minority union.[10]

Accordingly, the Board finds that the Respondent on May 17, 1957, and thereafter refused to bargain with the Association in violation of 8 (b) (3) of the Act by refusing to execute a contract covering Chicago Stevedoring because of its insistence that such contract encompass the work jurisdiction guarantee described above.

Conclusions of Law.

1. Chicago Stevedoring Co., is engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

2. Local 19, International Brotherhood of Longshoremen, AFL-CIO, is a labor organization within the meaning of Section 2 (5) of the Act.

10. See Texlite, Inc., 119 NLRB 1792.

3. All employees of the members of the Association (Maritime Service, Ltd., Interstate Contracting Corp., Chicago Stevedoring Co., Inc., Chicago Calumet Stevedoring Co., Lake Michigan Corporation, Seaway Stevedoring Co., Time, Inc., The Tribune Co., Chicago Daily News, International Steamship Terminals, Great Lakes Stevedoring Co.) who are engaged in all work affecting, directly or indirectly, the following operations:

(a) All fitting up, rigging up, and assembling of all cargoes;

(b) All work from the hold of vessel, through house to railroad car, truck, or upper floors, in warehouse, to its final resting place in said warehouse, or in removing cargo from the warehouse, up to, on and into the hold of the vessel, truck or car or vice-versa;

(c) All winches, conveyances, or conveyors pertaining to (a) and (b) above;

excluding all clerical or professional employees, house checkers, guards, and supervisors (superintendent, foremen, straw bosses, two (or tow) board bosses, and gang leaders) as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

4. The Respondent is, and at all time material herein, has been the exclusive representative of the employees in the appropriate unit for the purposes of collective bargaining within the meaning of Section 9 (a) of the Act.

5. By refusing to bargain for an appropriate unit, the Respondent has engaged in and is engaging in an unfair labor practice within the meaning of Section 8 (b) (3) of the Act.

6. The aforesaid unfair labor practice is an unfair labor practice affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

The Remedy.

Having found that the Respondents have refused to bargain with the association, in its failure to execute an agreement with Chicago Stevedoring Co., Inc., we shall order the Respondent to cease and desist from engaging in such unlawful conduct, and to take certain affirmative action designed to effectuate the policies of the Act.

Order.

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Local 19, International Brotherhood of Longshoremen, AFL-CIO, and its officers, representatives, successors, assigns, and agents, shall:

1. Cease and desist from:

(a) Insisting, as a condition precedent to executing a collective bargaining agreement including Chicago Stevedoring Co., Inc., covering employees in the unit found appropriate in paragraph 3 of the Conclusions of Law, that Wacker Warehouse guarantee that any work of transferring freight from its warehouse would fall within the jurisdiction of the Respondent, to the exclusion of any employees of Warehouse.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act.

(a) Upon request of Frederick W. Turner, spokesman for the Association, or of Chicago Stevedoring Co., Inc., execute a contract with Chicago Stevedoring Co., Inc., pursuant to the agreement of May 17, 1957, identical to the contract executed by Respondent with other members of the Association, effective from May 16, 1957, to and including May 15, 1960.

(b) Upon request, bargain collectively with the Association on the basis of the aforesaid appropriate unit and subject to the provisions of Section 9 (a) of the Act, with respect to rates of pay, wages, hours of employment, or other terms and conditions of employment, and if an understanding is reached, embody such understanding in a signed statement.

(c) Post in conspicuous places in its business office and meeting halls copies of the notice attached hereto as an Appendix.[11] Copies of said notice, to be furnished by the Regional Director for the Thirteenth Region, shall, after being duly signed by the Respondent's representative, be posted by it immediately upon receipt thereof, and be maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to members of the Respondent are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notice is not altered, defaced, or covered by any other material;

(d) Additional copies of said notice, to be furnished by the Regional Director for the Thirteenth Region, shall, after being duly signed by the Respondent's representative, be returned to the Regional Director for posting at the premises of each of the employers found herein to be members of the Association, if willing, for sixty (60) consecutive days, in places where notices to employees are customarily posted;

---

11. In the event this Order is enforced by a decree of a United States Court of Appeals, the notice shall be amended by substituting for the words "PURSUANT TO A DECISION AND ORDER" the words "PURSUANT TO A DECREE OF THE UNITED STATES COURT OF APPEALS, ENFORCING AN ORDER".

(e) Notify the Regional Director, in writing, within ten (10) days from the date of this Decision and Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D. C., Nov. 12, 1959.

Boyd Leedom, Chairman,
Philip Ray Rodgers, Member,
Stephen S. Bean, Member,
Joseph Alton Jenkins, Member,
John H. Fanning, Member,
NATIONAL LABOR RELATIONS BOARD.

(Seal)

Appendix.

Notice To All Members Of The International Brotherhood Of Longshoremen Local 19, AFL-CIO

Pursuant To

A Decision And Order

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify you that:

We Will, upon request, execute the contract agreed upon with the employer Association, with Chicago Stevedoring Co., Inc., a member of the Association, and no longer insist upon any unlawful condition precedent. We Will, upon request, bargain collectively with the Association of employers engaged in stevedoring operations in the Chicago area as the bargaining representative of the employees in the unit described below, and, if an understanding is reached, embody such understanding in a signed agreement.

The appropriate bargaining unit is:

All employees of the members of the Association* including the employees of Chicago Stevedoring Co.,

*Maritime Services, Ltd.
Interstate Contracting Corp.
Chicago Stevedoring Co., Inc.
Chicago Calumet Stevedoring Co.
Lake Michigan Corporation
Seaway Stevedoring Co.
Time, Inc.
The Tribune Co.
Chicago Daily News
Great Lakes Stevedoring Co
International Steamship Terminals

Inc., who are engaged in all work affecting, directly or indirectly, the following operations:

(a) All fitting up, rigging up, and assembling of all cargoes;

(b) All work from the hold of vessel, through house to car, truck or upper floors, in warehouse, to its final resting place in said warehouse, or in removing cargo from the warehouse, up to, on and into the hold of the vessel, truck or car or vice-versa;

(c) All winches, conveyances, or conveyors pertaining to (a) or (b) above;

but excluding all clerical and professional employees, guards, house checkers, and supervisors (superintendents, foremen, straw bosses, two (or tow) board bosses, and gang leaders) as defined in the Act.

INTERNATIONAL BROTHERHOOD OF LONGSHOREMEN, LOCAL 19, AFL-CIO

Dated..... By.....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

IN THE UNITED STATES COURT OF APPEALS

for the Seventh Circuit.

September Term, 1960—January Session, 1961.

No. 12979

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

LOCAL 19, INTERNATIONAL BROTHERHOOD OF LONGSHOREMEN, AFL-CIO, *Respondent*.

Petition for enforcement of an Order of the National Labor Relations Board.

January 10, 1961.

Before HASTINGS, *Chief Judge*, and SCHNACKENBERG and KNOCH, *Circuit Judges*.

KNOCH, *Circuit Judge*. The National Labor Relations Board is here seeking enforcement of its order issued November 12, 1959, against respondent, to cease and desist from unlawful refusal to bargain.

The order directed respondent to:

"1. Cease and desist from:

(a) Insisting, as a condition precedent to executing a collective bargaining agreement including Chicago Stevedoring Co., Inc., * * * that Wacker Warehouse guarantee that any work of transferring freight from its warehouse would fall within the jurisdiction of the Respondent, to the exclusion of any employees of Warehouse."

The Board found that, for more than 20 years, collective bargaining in the Chicago longshore operations had been conducted on a group basis. The practice had been that as the contract expiration date approached, respondent would ask all stevedore-employing companies to set a date to discuss a new contract. The employers would meet to draft a joint proposal which would be submitted to respondent at the first meeting, at which time each employer would receive a copy of respondent's proposals. The employers, meeting together, would determine their position by majority vote. At later meetings, with respondent, one employer-representative would be the principal spokesman for the employer group. In recent years, Frederick W. Turner, Jr., appears to have performed this function, although other employer-representatives, occasionally, discussed particular phases of the contract with respondent. The signing of a memorandum of agreement by representatives of respondent and of the employers was followed by execution of individual contracts with the individual employers. For some years, now, these individual contracts have been identical. Respondent contends that the employers never constituted an "association". There was some conflicting testimony on this point, but the record shows ample evidence to support the Board's finding.

The Board found that no member company ever refused to execute an individual contract after the memorandum of agreement had been signed, or ever broke away from the negotiations to bargain independently. Whenever a new stevedoring company entered the field, the newcomer would be offered the contract currently in effect with the others. A single exception shown was that of Seaway Stevedoring Co., which in 1956 was given a contract running to 1959. However, that contract was to incorporate changes resulting from negotiations in 1957, and Seaway was represented at the 1957 talks.

The disputed work concerns only one segment of the merchandise handled by Wacker Warehouse Company, which operates a storage warehouse: *i.e.* merchandise which arrives by boat or barge and is moved into storage. From 1951 to 1953, all unloading of marine merchandise was carried on, for Wacker, by Illinois Warehouse Co., an independent concern, which had a contract with respondent and which used respondent's longshoremen to unload cargo and to move it into storage, or to load it directly onto trucks or freight cars. All merchandise, marine and non-marine, which was removed from storage to trucks or trains was handled by Wacker's own employees under Wacker's contract with Miscellaneous Warehousemen's Union, Local 781. In 1953, Wacker undertook the work previously performed for it by Illinois Warehouse and also assumed the contract with respondent. When the time came to remove marine merchandise from storage to trucks and trains, respondent demanded this work for its members. However, this work of removing all merchandise from storage was guaranteed to Wacker's employees under their aforesaid contract with Wacker. The Board found that after a discussion of the demands, respondent had acquiesced in the then division of work whereby marine cargo which had gone into storage would subsequently be taken from storage and loaded onto trains or trucks by Local 781 Warehousemen only. In May, 1954, Wacker and respondent entered into the standard industry contract to run until May, 1955. This standard contract provided that respondent's members would have jurisdiction of:

> "All work from the hold of vessel, through house to car, truck or upper floors, in warehouse, to its final resting place in said warehouse, or *in removing cargo from the warehouse, up to, on and into the hold of the vessel, truck or car, or vice versa.*" [Emphasis added.]

The Board found that as the emphasized wording was inconsistent with the previous understanding between Wacker and respondent, respondent agreed that the emphasized words would not apply to Wacker. General Counsel's Exhibit No. 15, shows an asterisk inserted prior to the words "truck or car, or vice versa," and a footnote "per letter attached," but the Board notes in its decision that no letter was attached. Wacker did write respondent twice asking for written confirmation of this exception, but respondent made no reply. The Board found, however, that the Local 781 warehousemen continued to handle marine merchandise after it had been in storage and was being loaded onto trucks or trains. Here too, there is a conflict in testimony, but sufficient support exists in the record for the Board's finding.

The new contract in May, 1955, contained the same provision. Respondent staged a work stoppage in support of its demand for conformity with the exact wording of the provision. Wacker still had its contract with its warehousemen employees which gave them the disputed work. Wacker then abandoned the business of receiving marine merchandise for storage.

In March, 1957, Wacker joined with the other employers in negotiating a new contract with respondent. When preliminary discussions indicated that respondent intended to insist on the same provision as quoted above, Wacker dropped stevedoring operations entirely.

Henry Marsh, a sales representative on a monthly retainer for about twenty warehouse concerns, including Wacker, and George Johnson, a Wacker foreman, organized Chicago Stevedoring Co., which entered into a contract with Wacker to take over the business which Wacker was discontinuing. On May 13, 1957, Chicago Stevedoring was invited to join in the then pending contract negotiation talks. Wacker ceased to take any part in those negotiations.

Mr. Marsh, President of Chicago Stevedoring, and Mr. Turner, both testified that on May 16th, in response to questions from respondent's representatives, they had given assurances that Chicago Stevedoring and Wacker were entirely separate and independent, and that respondent's longshoremen members would have all the work which Chicago Stevedoring had to give. This did not satisfy respondent.

To avoid delay in the agreement, which was otherwise complete, a paragraph was added to the memorandum of agreement, as follows:

> "15. Agreement with respect to Chicago Stevedoring Company only is subject to mutual agreement concerning the jurisdiction of work formerly at Wacker Warehouse, now at Chicago Stevedoring Company, handled by Local 19 under agreement expiring May 15, 1957."

This memorandum was signed by Mr. Turner for the employers and by counsel for respondent. Individual contracts embodying the agreed provisions were promptly tendered all employers except Chicago Stevedoring.

On May 27th, Mr. Turner offered to execute the same contract for Chicago Stevedoring as had been tendered the oth - employers, under the terms of which, Chicago Stevedoring would be obligated to give all its work to respondent. Respondent refused this and a similar offer on August 22nd. On October 5th, counsel for respondent promised Chicago Stevedoring a contract if Chicago Stevedoring and Wacker would agree to a letter of understanding to the effect that respondent's longshoremen members, contrary to the facts as found by the Board, were currently moving marine freight out of Wacker's storage onto trucks and trains, and that respondent's members would continue to have exclusive jurisdiction of this work. Neither Chicago Stevedoring nor Wacker agreed. On No-

vember 6, 1957, November 20, 1957, and April 11, 1958, Mr. Turner again, without success, offered respondent the standard contract. At the last occasion, counsel for respondent, for the first time, suggested a contract with a higher scale of wages.

It thus appears that after entering into the agreed contract with the employers' association, respondent violated its duty to bargain in that respondent insisted on securing a guaranty of work belonging to Wacker, outside the scope of mandatory bargaining, as a condition of executing the agreed contract with Chicago Stevedoring. *N.L.R.B.* v. *Wooster Division of Borg Warner Corp.*, 356 U.S. 342, 349-350 (1958).

The Trial Examiner recommended dismissal of the complaint on the ground that the bargaining invitation was not extended by Mr. Turner expressly in the name of the employers' association. Respondent contends that the Board itself, having set aside the Trial Examiner's findings, and having made new findings, failed to make any specific finding that a request to bargain with the association (rather than with Chicago Stevedoring) was in fact made. In addition, respondent argues that allegations made in the initial complaint, prior to its amendment, constitute admissions by the General Counsel.

A finding that respondent was being requested to bargain with the association is implicit in the findings and conclusions of the Board, although it is not individually stated in so many words. The complaint initially charged a refusal to bargain with Chicago Stevedoring, and stated that Chicago Stevedoring's employees comprised a unit appropriate for bargaining. Well before the hearing, the General Counsel amended the complaint to charge refusal to bargain with the association of employers and alleged that a unit of all the longshoremen employed by all the association members (including Chicago Stevedoring) was

a unit appropriate for bargaining. It is not unusual for there to be more than one "appropriate" unit. The Board may choose from among several appropriate units. *Mueller Brass Co.* v. *N.L.R.B.*, C.A., D.C., 1950, 180 F. 2d 402, 405; *Harris Langenberg Hat Co.* v. *N.L.R.B.*, 8 Cir., 1954, 216 F. 2d 146, 148. The Board found that Mr. Turner executed the memorandum of agreement for the employers. The evidence showed that on numerous occasions, Mr. Turner offered to execute the same agreement for Chicago Stevedoring as for the other members of the association, pursuant to the aforesaid memorandum of agreement. It does not appear that respondent can have been confused as to the invitation to bargain. Whether Mr. Turner announced at each meeting that he was representing the association was not material. The form of the request is not controlling. *M. H. Ritzwoller Co.* v. *N.L.R.B.*, 7 Cir., 1940, 114 F. 2d 432, 435-6; *N.L.R.B.* v. *Scott & Scott*, 9 Cir., 1957, 245 F. 2d 926, 927-8; *N.L.R.B.* v. *Southeastern Rubber Mfg. Co.*, 5 Cir., 1954, 213 F. 2d 11, 14. In refusing to execute the agreement, under the circumstances here shown, the respondent was refusing to bargain with the association.

As the only issue left to be resolved concerned a guaranty on which respondent had no right to insist, the Board could properly order execution of the standard contract pursuant to the memorandum of agreement. *N.L.R.B.* v. *R. D. Nesen*, 9 Cir., 1954, 211 F. 2d 559, cert. den. 348 U. S. 820; *N.L.R.B.* v. *Dalton Tel. Co.*, 5 Cir., 1951, 187 F. 2d 811, 812, cert. den. 342 U.S. 824; *H. J. Heinz Co.* v. *N.L.R.B.*, 311 U.S. 514, 526 (1941). However, the contract in question would have expired by its terms in May, 1960. That portion of the Board's order directing execution of that specific contract has thus become moot. We are given to understand from statements of counsel made in oral argument that the issues involved here are not moot; that by agreement of the parties in current contracts and

memorandum of agreement, these issues have been preserved.

With the sole exception noted above, enforcement of the Board's order in full is hereby granted.

All arguments raised by the parties which have not been the subject of particular comment in this opinion have nevertheless been carefully considered in arriving at our decision.

ENFORCEMENT GRANTED IN PART AND DENIED IN PART AS MOOT.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

NATIONAL LABOR RELATIONS BOARD, *Petitioner*, vs. LOCAL 19, INTERNATIONAL BROTHERHOOD OF LONGSHOREMEN, AFL-CIO, *Respondent*.	No. 12979

February 28, 1961.

DECREE ENFORCING IN PART AND SETTING ASIDE IN PART AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

Before HASTINGS, *Chief Judge*, and SCHNACKENBERG and KNOCH, *Circuit Judges*.

This cause came on to be heard upon a petition of the National Labor Relations Board for the enforcement of an order issued by it on November 12, 1959, against the above-named respondent, and its officers, representatives, successors, assigns, and agents. The Court heard argument of respective counsel on December 2, 1960, and has considered the briefs and transcripts of record filed in this cause. On January 10, 1961, the Court being fully advised in the premises, handed down its decision enforcing in part and setting aside in part, the Board's said order. In conformity therewith,

It Is Hereby Ordered, Adjudged, and Decreed, that the Respondent, Local 19, International Brotherhood of Longshoremen, AFL-CIO, and its officers, representatives, successors, assigns, and agents, shall:

1. Cease and desist from:

(a) Insisting, as a condition precedent to executing a collective bargaining agreement including Chicago Stevedoring Co., Inc., covering employees in the unit found appropriate in paragraph 3 of the Conclusions of Law, that Wacker Warehouse guarantee that any work of transferring freight from its warehouse would fall within the jurisdiction of the Respondent, to the exclusion of any employees of Warehouse.

2. Take the following affirmative action which the Board has found will effectuate the policies of the National Labor Relations Act, hereinafter called the Act.

(a) Upon request, bargain collectively with the Association on the basis of the aforesaid appropriate unit and subject to the provisions of Section 9(a) of the Act, with respect to rates of pay, wages, hours of employment, or other terms and conditions of employment, and if an understanding is reached, embody such understanding in a signed statement.

(b) Post in conspicuous places in its business office and meeting halls copies of the notice attached hereto and marked Appendix. Copies of said notice, to be furnished by the Regional Director for the Thirteenth Region, Chicago, Illinois, shall, after being duly signed by the Respondent's representative, be posted by it immediately upon receipt thereof, and be maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to members of the Respondent are customarily posted. Reasonable steps shall be taken

by the Respondent to insure that said notice is not altered, defaced or covered by any other material:

(c) Additional copies of said notice, to be furnished by the aforesaid Regional Director, shall, after being duly signed by the Respondent's representative, be returned to the Regional Director for posting at the premises of each of the employers found herein to be members of the Association, if willing, for sixty (60) consecutive days, in places where notices to employees are customarily posted;

(d) Notify the said Regional Director, in writing, within ten (10) days from the date of this Decree, what steps the Respondent has taken to comply herewith.

s/ JOHN S. HASTINGS,
Chief Judge, United States Court of Appeals for the Seventh Circuit

s/ ELMER J. SCHNACKENBERG,
Judge, United States Court of Appeals for the Seventh Circuit.

s/ WIN G. KNOCH,
Judge, United States Court of Appeals for the Seventh Circuit.

February 28, 1961.

Filed: U.S.C.A.—7th Circuit, February 28, 1961, Kenneth J. Carrick, Clerk.

A True Copy:
Teste:
(Seal) KENNETH J. CARRICK.
Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX.

Notice to All Members of the International Brotherhood of Longshoremen Local 19, AFL-CIO

Pursuant to

A Decree of the United States Court of Appeals enforcing in part an order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify you that:

We will, cease and desist from insisting, as a condition precedent to executing a collective bargaining agreement including Chicago Stevedoring Co., Inc., covering employees in the unit found appropriate, that Wacker Warehouse guarantee that any work of transferring freight from its warehouse would fall within our jurisdiction, to the exclusion of any employees of Warehouse.

We will, upon request, bargain collectively with the Association of employers engaged in stevedoring operations in the Chicago area as the bargaining representative of the employees in the unit described below, and, if an understanding is reached, embody such understanding in a signed agreement.

The appropriate bargaining unit is:

All employees of the members of the Association*

---

*Maritime Services, Ltd.
Interstate Contracting Corp.
Chicago Stevedoring Co., Inc.
Chicago Calumet Stevedoring Co.
Lake Michigan Corporation
Seaway Stevedoring Co.
Time, Inc.
The Tribune Co.
Chicago Daily News
Great Lakes Stevedoring Co.
International Steamship Terminals

including the employees of Chicago Stevedoring Co., Inc., who are engaged in all work affecting, directly or indirectly, the following operations:

(a) All fitting up, rigging up, and assembling of all cargoes;

(b) All work from the hold of vessel, through house to car, truck or upper floors, in warehouse, to its final resting place in said warehouse, or in removing cargo from the warehouse, up to, on and into the hold of the vessel, truck or car or vice-versa;

(c) All winches, conveyances, or conveyors pertaining to (a) or (b) above;

but excluding all clerical and professional employees, guards, house checkers, and supervisors (superintendents, foremen, straw bosses, two (or tow) board bosses, and gang leaders) as defined in the Act.

INTERNATIONAL BROTHERHOOD OF LONGSHOREMEN, LOCAL 19, AFL-CIO.

Dated..... By.....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

Chicago 10, Illinois.

Tuesday, February 28, 1961.

Before

Hon. JOHN S. HASTINGS, *Chief Judge,*
Hon. ELMER J. SCHNACKENBERG, *Circuit Judge,*
Hon. WIN G. KNOCH, *Circuit Judge.*

No. 12979

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

vs.

LOCAL 19, INTERNATIONAL BROTHERHOOD OF LONGSHOREMEN, AFL-CIO, *Respondent.*

Petition for Enforcement Of An Order Of the National Labor Relations Board.

IT IS ORDERED by the Court that the petition for a rehearing of this cause be, and the same is hereby, DENIED.

SUPREME COURT, U. S.
No. 119

FILED
JUN 28 1961
JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1961

LOCAL 19, INTERNATIONAL BROTHERHOOD OF LONGSHOREMEN, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
Department of Justice,
Washington 25, D. C.

STUART ROTHMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

LEE M. MODJESKA,
Attorney,
National Labor Relations Board,
Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 119

LOCAL 19, INTERNATIONAL BROTHERHOOD OF LONGSHOREMEN, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 47-54) is reported at 286 F. 2d 661. The decision and order of the National Labor Relations Board (Pet. App. 28-46) are reported at 125 NLRB 61.

JURISDICTION

The decision of the court of appeals was issued on January 10, 1961, and a decree was entered on

February 28, 1961 (Pet. App. 47, 55). Petitioner's request for rehearing was denied on February 28, 1961 (Pet. App. 60). The petition for certiorari was filed on May 27, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, on the facts of this case, the Labor Board was warranted in not making certain explicit findings before concluding that the Union had refused to bargain in violation of Section 8(b)(3) of the National Labor Relations Act.

STATUTES INVOLVED

The relevant statutory provisions are set forth at pp. 13-16 of the petition.

STATEMENT

A. The Board's Findings of Fact

During the past 20 to 25 years, about 11 Chicago companies which use longshoremen labor have bargained on a group basis with Local 19, International Brotherhood of Longshoremen, AFL-CIO (B.A. 14; 33-34, 92, 93).[1] The group has formed an informal association, which operates as follows: Prior to meeting with the Union, employer representatives meet together to draft a joint proposal. As negotiations progress, they hold further meetings to discuss Union demands and to formulate counter-proposals (B.A.

[1] "B.A." refers to the appendix to the Board's brief in the court below.

14-15; 35-36, 46, 90, 94). Disagreements among the companies are resolved by majority vote (B.A. 15; 37, 46-47), and a single counter-proposal is presented to the Union on behalf of the entire Association (B.A. 15; 35, 90-93). The job of negotiating with the Union falls mainly on a chief spokesman, who is retained separately by some of the companies, but who represents all of them during contract talks (B.A. 15; 34-35, 57-58). Once there is agreement on contract terms, a memorandum of agreement is signed by the Union and the Association (B.A. 58, 61). Its terms are then incorporated into identical individual contracts executed between the Union and each of the employers represented in the negotiations (B.A. 37-38, 43-44, 58, 61). No member company has ever broken away from the negotiations to bargain independently, or refused to execute its own individual contract with the Union after the memorandum of agreement was signed (B.A. 108).

Since 1951, Wacker Warehouse Company has operated a storage warehouse in Chicago (B.A. 18; 45), where it stores merchandise which arrives by boat or barge and other goods. A dispute arose between Wacker and Local 19 over who would perform the work of moving marine freight out of storage. Local 19 had a contract with Wacker for unloading such freight, but the removal from storage work was assigned to Wacker's "inside" employees who were represented by another union, Warehousemen's Local 781 (B.A. 18; 45, 112-114). Matters "rocked along" until May 1955, when Wacker abandoned the business of receiving waterborne freight for storage (B.A. 19, 21-22; 47, 64-65, 117-118).

In March 1957, Wacker joined other Association employers in negotiating a new contract with the Union. When Wacker realized that the Union intended to insist on a provision giving it the right to move marine goods from storage[2] and to enforce the provision if Wacker resumed the storaging of marine freight, Wacker dropped its stevedoring operation entirely (B.A. 19; 48).

Subsequently, the Chicago Stevedoring Company was independently organized to take over the work which Wacker was abandoning, and Chicago entered into a contract with Wacker (B.A. 13, 19; 53, 75). At the same time Chicago obtained the Union's consent to join the other Association members in the current contract talks (B.A. 17; 75. 154, 155), and on May 13, 1957, it began to attend the meetings of the employer group and to participate in the collective bargaining sessions (B.A. 17; 60).[3]

On May 16, with final agreement on contract changes in sight, Union representatives approached Frederick Turner, chief spokesman and representative of the Association, and Henry Marsh, president of Chicago Stevedoring, to question them about the

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[2] The provision in question, Article 1(b), provided that the Union should have jurisdiction of (B.A. 166): "All work from the hold of vessel, through house to car, truck or upper floors, in warehouse, to its final resting place in said warehouse, or *in removing cargo from the warehouse, up to, on and into the hold of the vessel, truck or car, or vice versa.*" (Emphasis added.)

[3] Wacker thereupon ceased to have anything further to do with the negotiations (B.A. 40).

relation between Chicago and Wacker, and also about the work to be given Union longshoremen. Turner and Marsh assured the Union that Chicago was entirely separate and independent from Wacker, that their sole relation was contractual, and that Union longshoremen would get all the work which Chicago had to give (B.A. 70, 76-77). The Union remained dissatisfied.

In order to prevent this issue, involving Chicago alone, from holding up an agreement which was otherwise complete, the following paragraph was added to the memorandum of agreement between the Association and the Union (B.A. 17; 71-72, 77, 78, 138):

> 15. Agreement with respect to Chicago Stevedoring Company only is subject to mutual agreement concerning the jurisdiction of work formerly at Wacker Warehouse, now at Chicago Stevedoring Company, handled by Local 19 under agreement expiring May 15, 1957.

On May 17, this memorandum was signed by attorneys Friedman for the Union and Turner for the Association (B.A. 17; 60-61, 72). Promptly thereafter the Union tendered contracts to all the Association employers except Chicago Stevedoring (B.A. 17; 61).

On May 27, Turner met with Union representatives to settle the issue of work jurisdiction and to obtain a written contract for Chicago Stevedoring. He pointed out to the Union that once Chicago's longshoremen delivered waterborne freight to Wacker for storage these goods passed from that company's control and became Wacker's responsibility. Subsequent

handling of such goods was Wacker's work, he said, subject to its contract with Warehousemen's Local 781. Accordingly, Turner offered to execute the Association contract, under which Chicago obligated itself to give *all of its work* to Local 19 (B.A. 61-66). The Union refused this offer and a similar offer of August 22, 1957 (B.A. 156).

On October 5, 1957, Friedman offered to compose a letter of understanding among Chicago, Wacker and the Union which would deal with the problem of work jurisdiction in a way agreeable to all parties, and promised to execute a contract if Chicago and Wacker agreed to its terms (B.A. 82-83). Neither company signed the proposed letter, for it stated that Local 19 longshoremen were currently moving marine freight out of storage at Wacker and provided that the longshoremen would "continue" to have exclusive jurisdiction of this work (B.A. 19; 84, 163-164). Turner then offered, on November 6 and again on November 20, to execute the Association contract for Chicago, which offer the Union again rejected (B.A. 157-158, 159).

B. The Board's Conclusions and Order

On the foregoing facts, the Board found that all of the stevedoring companies had associated themselves for purposes of collective bargaining into a single multi-employer unit; that Local 19 was the statutory representative of the longshoremen employees in that unit; that Chicago Stevedoring Company had joined the multi-employer unit and participated in the 1957 contract negotiations; and that

Chicago Stevedoring was completely independent from Wacker Warehouse Company and was doing business with Wacker as an independent contractor (B.A. 14-17).

The Board further found that, as of May 17, the parties had reached agreement on contract terms for all of the companies, including Chicago Stevedoring, except that the issue of work jurisdiction, insofar as Chi- resolution (B.A. 17- was deferred for subsequent paragraph 15 of the M. The Board thus viewed ment (*supra*, p. 5) dy 15 memorandum of agree- aminer, who had inte ferently from the Trial Ex- bargain at a later da reted it as an agreement to cago Stevedoring fron which entirely removed Chi- Association and the the negotiations between the

Finally, the Board ion (B.A. 8-11). entered into contracts and that, although the Union unit, it refused to do ith the other members of the condition that work be with Chicago, except on the Since the latter work ging to Wacker be included. the Board held that, outside the bargaining unit. violated its bargaining insisting on it, the Union (3) of the Act. (B.A ligation under Section 8(b) 21-23.)

The Board's order d cted the Union to cease and desist from conditioni the execution of a contract with Chicago Stevedo g upon a guaranty from Wacker Warehouse th Union longshoremen, rather than members of Wa ousemen's Local 781 in the employ of Wacker, wo be assigned to move freight out of storage. Affirm ively, the Board ordered the Union to execute with icago Stevedoring a contract

comparable to those executed with the other members of the unit, to bargain collectively with the Association in the future, and to post appropriate notices (B.A. 24-25).

C. The Decision of the Court of Appeals

The court of appeals entered a decree enforcing the Board's order (Pet. App. 46-54). The court held that under these circumstances the Board could properly conclude that, by conditioning execution of the standard contract upon a guaranty on which the Union had no right to insist, the Union had refused to bargain with the Association, in violation of Section 8(b)(3) of the Act. In so doing, the court found without merit the Union's contention that the Board had failed to make a specific finding that the Union had been requested to bargain with the Association rather than Chicago Stevedoring (Pet. App. 52-53).

ARGUMENT

Petitioner does not contend that there was no substantial evidence upon the whole record to warrant the Board's finding that Wacker and Chicago Stevedoring were two separate and independent entities. Compare *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474. Nor does petitioner directly attack the Board's conclusion that its insistence that Chicago Stevedoring guarantee it work outside of the bargaining unit, which was being performed by another employer, Wacker, was a violation of Section 8(b)(3) of the Act. Rather petitioner seeks review only upon the narrow ground (Pet. 5-

11) that the Board's ultimate determination that the union had committed an unfair labor practice is defective because the Board failed to make an explicit finding that the Association had requested the Union, on and after May 17, 1957, to bargain with it concerning a contract for Chicago Stevedoring.

1. A new request by the Association would have been material only on the Trial Examiner's theory of the case, which the Board rejected. The Trial Examiner had viewed paragraph 15 of the May 17 memorandum of agreement (see the Statement, *supra*, p. 5) as "an agreement to bargain at a later date," which had the effect of severing Chicago Stevedoring from the Association's bargaining negotiations on behalf of the other members (Pet. App. 25). On this assumption, if the Association, on behalf of Chicago Stevedoring, were again to resume bargaining with the union, it would perhaps have to address a new specific request to the union to bargain. The Board, however, regarded paragraph 15, not as removing Chicago Stevedoring from the negotiations, but as merely reserving the issue of work jurisdiction for further negotiation. Under this view, Chicago, through the Association, and the Union in effect agreed to be bound by the contract negotiated by the Association, subject only to additional discussion of the work jurisdiction question (Pet. App. 35).[4] It was thus immaterial whether Turner explicitly iden-

[4] Reference to the Board's decision (Pet. App. 35) shows that, contrary to petitioner's contention (Pet. 10), the Board stated its reasons for disagreeing with the Trial Examiner, and thereby adequately set forth the basis for its holding.

tified himself as representing the Association when he later requested the Union to negotiate the work jurisdiction question. Since Chicago had remained in the Association throughout, the Union's original obligation to bargain with the Association, which unquestionably existed up to May 17, 1957, continued until the issue reserved by the Association with respect to Chicago Stevedoring was resolved.

2. In any event, even if it be assumed that it was necessary to establish that a new request to bargain was made by the Association after May 17, the court below correctly held that such a request was "implicit" in the subsequent negotiations and in the Board's findings thereon. As shown in the Statement, *supra*, pp. 5-6, on May 27 and several times thereafter Turner met with, or wrote to, representatives of the Union, discussed the work jurisdiction problem with them, and asked them to enter into the Association contract with Chicago. Since the requests were made for the purpose of having the Union discharge whatever remained of its obligation to the Association under paragraph 15 of the memorandum of agreement, and were advanced by counsel who had represented the Association in the bargaining negotiations, they could properly be regarded as having been made only on behalf of that entity, rather than on behalf of Chicago individually. To have required Turner to go further and preface his attempts to negotiate on the work jurisdiction issue with the express announcement that he came as

a representative of the Association, would be to exalt form over substance.*

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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June, 1961.

Although a party seeking to bargain must make that wish plain to the other side (*National Labor Relations Board* v. *Columbian Enameling Co.*, 306 U.S. 292, 297-298; *National Labor Relations Board* v. *Valley Broadcasting Co.*, 189 F. 2d 582, 586 (C.A. 6)), the statute does not require that the "request to bargain be in *haec verba*, so long as there was one by clear implication" (*Jay Silk Mills, Inc.* v. *National Labor Relations Board*, 185 F. 2d 732, 741 (C.A. D.C.); see *National Labor Relations Board* v. *Southeastern Rubber Mfg. Co., Inc.*, 213 F. 2d 11, 14-15 (C.A. 5)).

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